

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. **77-1735**

ANTHONY THOMAS,

Petitioner,

v.

THE STATE OF NORTH CAROLINA,

Respondent.

Petition for a Writ of Certiorari
To the Supreme Court of North Carolina

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No.

ANTHONY THOMAS,

Petitioner,

v.

THE STATE OF NORTH CAROLINA,

Respondent.

Petition for a Writ of Certiorari
To the Supreme Court of North Carolina

To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court
of the United States:

Anthony Thomas, the Petitioner, prays
that a writ of certiorari issue to review
the judgment of the Supreme Court of North
Carolina entered in the above entitled
case on March 8, 1978.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported at 34 N.C. App. 594, 239 S.E. 2d 288 (1978) and is printed in Appendix E, *infra* p.21. The order by the North Carolina Court of Appeals denying the Petitioner's Motion to Suspend Rules and Petition for Rehearing is printed in Appendix G, *infra*, p.29. The order of the Supreme Court of North Carolina denying the Petitioner's Petition for Discretionary Review of Determination by the Court of Appeals is printed in Appendix A, *infra*, p.1 .

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257 (3).

The Petitioner raised and presented the federal questions involved herein to the Supreme

Court of North Carolina in a Petition for Discretionary Review of Determination by the Court of Appeals, (Appendix H, infra p.30) to review the opinion of the North Carolina Court of Appeals in the instant case rendered on December 7, 1977 (Appendix E, infra p.21) An order denying such review by the North Carolina Supreme Court was issued on March 8, 1978 and certified to the North Carolina Court of Appeals.

QUESTIONS PRESENTED

1. WHETHER THE STATE OF NORTH CAROLINA MAY DENY TO A CRIMINAL DEFENDANT'S COUNSEL ON APPEAL BOTH THE OPPORTUNITY TO APPEAR FOR ORAL ARGUMENT AND THE OPPORTUNITY TO PETITION THE APPELLATE COURT FOR REHEARING IF THE DEFENDANT BELIEVES IN GOOD FAITH THAT THE COURT HAS OVERLOOKED OR MISAPPREHENDED HIS CONTENTIONS ON APPEAL?

2. WHETHER RULE 31 OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE ALLOWING FOR PETITIONS FOR REHEARING IN APPEALS OF CIVIL CASES AND PROHIBITING PETITIONS FOR REHEARING IN APPEALS OF CRIMINAL CASES IS VIOLATIVE OF THE RIGHTS OF CRIMINAL DEFENDANTS SECURED BY THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT?

CONSTITUTIONAL PROVISION AND
STATUTES INVOLVED

This case involves the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, providing as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

and involves the following rules of the North Carolina Rules of Appellate Procedure;

Rule 30(f): (1) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule.

(2) If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument.

Rule 31(a): (a) Time for filing:
Content: A petition for rehearing may be filed in a civil action within 20 days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended, and shall contain such argument in support of the petition as the petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who, for periods of at least five years respectively, shall have been members of the bar of State and who have no interest in the subject of the action and have not been of counsel for any party to the action, that they carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition

will not be permitted.

Rule 31(g): No Petition in Criminal Cases. The courts will not entertain petitions for rehearing in criminal actions.

Rule 28(h): Reply Briefs. Except for a reply brief filed under subdivision (c) of this Rule 28, or unless the court upon its own initiative orders a reply brief to be filed and served, none will be received or considered by the court.

Rule 28(c): Content of Appellee's Brief; Presentation of Additional Questions. An appellee's brief in any appeal shall contain an argument and a conclusion in the form provided in Rule 28(b)(3) and (4) for an appellant's brief. It need contain no statement of the questions presented nor of the case, unless the appellee disagrees with the appellant's statements and desires to make a restatement of either, or unless the appellee desires to present questions in addition to those stated by appellant. Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal

by the appellant. Within 20 days after service upon him of an appellee's brief presenting such questions, an appellant may file and serve upon all parties a reply brief limited to those additional questions presented in the appellee's brief.

STATEMENT OF THE CASE

The Petitioner was indicted for robbery with a dangerous weapon on January 25, 1977 and tried before a jury on February 28, 1977 in Moore County Superior Court. The prosecution's case-in-chief consisted of one witness who picked out the Defendant's picture from a photographic line-up conducted by police officer Arthur Frye. Mr. Frye interviewed the Petitioner twice after the alleged identification but made no arrest until eight days later.

During the trial of the case Defense counsel attempted to elicit from the Petitioner the number of times and the circumstances under which the Petitioner had seen officer Frye since the date of the

robbery. The District Attorney objected to the admissibility of such evidence, complaining that the Defendant was trying to prejudice the State's case. The trial court sustained the State's objection to the testimony, and following a verdict of guilty the Petitioner was sentenced to a term of not less than 30 years or more than 35 years in the Department of Corrections.

The Petitioner appealed to the North Carolina Court of Appeals alleging as his first ground of error the trial court's action in sustaining the State's objection to the admission of the date of arrest. In his brief, the Petitioner contended that the number of conversations between Officer Frye and the Petitioner and the ultimate date of arrest was relevant in that it shed light on the certainty of the identification of the Defendant by the State's

witness. (Appendix B, infra p.2) The Defendant's brief made a single ill-considered reference to evidence of flight and non-flight, "it is submitted that the reasons justifying the admission of evidence of flight also justify admission of evidence of non-flight." (Appendix B, infra p7)

Petitioner's counsel referred to evidence of flight and non-flight as a policy argument supporting the relevance of the offered testimony and was not aware of a venerable rule of evidence in North Carolina concerning evidence of non-flight.

The brief for the State discussed the Petitioner's argument and then stated the general rule in North Carolina concerning evidence of non-flight; "It is settled in North Carolina that a defendant's failure to take advantage of the opportunity to escape is not admissible in his behalf. State v.

Taylor, 61 N.C. 508 (1868), State v. Wilcox, 132 N.C. 1120, 44 S.E. 625 (1903)" Appendix C infra p 15.

Rule 28(h) of the North Carolina Rules of Appellate Procedure prohibited the Defendant from filing a reply brief to discuss the applicability or the continued validity of Taylor or Wilcox, supra, both of which were previously unknown to Defendant's counsel. On October 11, 1977 the Clerk of the North Carolina Court of Appeals notified Defendant's counsel that, pursuant to Rule 30(f) of the Rules of Appellate Procedure, he was not to appear for oral argument. Appendix D, infra p. 20.

On December 7, 1977 the North Carolina Court of Appeals filed its opinion in the present case affirming the Petitioner's conviction. However, in discussing Petitioner's first assignment of error,

the opinion adopted the State's argument concerning evidence of non-flight and did not discuss the Petitioner's contention that the excluded evidence was relevant and admissible insofar as it bore on the certainty of the identification by the State's witness. Appendix E, infra p.23.

Rule 31 of the Rules of Appellate Procedure provide that although a party in a civil case may petition the Court for a rehearing when he believes in good faith that the Court has misapprehended his contentions, a criminal defendant is denied the opportunity to file such a petition seeking a rehearing of the matter. Nevertheless, the Petitioner filed on January 11, 1978 a "Motion to Suspend Rules and Petition for Rehearing" before the Court of Appeals and further asking that he be permitted to file a supplemental brief in the case limited to the question of whether Taylor and Wilcox are applicable or should be

overruled. Appendix F, infra p. 25.

Simultaneously, the Petitioner filed a Petition for Discretionary Review with the Supreme Court of North Carolina seeking a review of the opinion of the Court of Appeals and raising the federal questions presented herein. Appendix H infra p. 30. The Petitioner alleged in said petition that "insofar as a criminal defendant can be denied the opportunity to appear for oral argument, file a reply brief, or petition for rehearing, the North Carolina Rules of Appellate Procedure are violative of Defendant's rights secured by the due process clause of the Fifth Amendment of the Constitution of the United States and the equal protection clause of the Fourteenth Amendment of the Constitution of the United States." Appendix H infra p. 30.

By order dated March 8, 1978 the Supreme Court of North Carolina denied the Petitioner's prayer for relief and took no

action pertinent to the Petitioner's allegations that Rule 31(g) violated rights secured to the Petitioner by the Fourteenth Amendment to the United States Constitution. (Counsel inadvertently cited the Fifth Amendment in the petition) Appendix A, infra p. 1.

Petitioner now seeks a writ of certiorari by this Court to review the judgment of the Supreme Court of North Carolina.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO ENABLE THIS COURT TO SET FORTH, IN LIGHT OF THE INCREASING CASELOAD IN ALL APPELLATE COURTS, MINIMUM CONSTITUTIONAL STANDARDS FOR THE REVIEW OF CRIMINAL APPEALS IN STATE APPELLATE COURTS.

A constant theme sounded by appellate judges throughout the United States is the recent dramatic rise in caseloads and the necessity of new measures to deal with

the problem. In his address to the 1977 annual meeting of the North Carolina State Bar, Chief Judge Walter E. Brock of the North Carolina Court of Appeals reported that the number of appeals presented to the Court increased from 673 in 1970 to 1061 in 1976.¹ The North Carolina Rules of Appellate Procedure, in effect since July 1, 1975, contain certain provisions designated to help alleviate the crowded dockets in the appellate courts of North Carolina. This case presents the question of whether those provisions impinge on fundamental constitutional rights of criminal defendants secured by the Fourteenth Amendment of the United States Constitution.

The Petitioner respectfully submits that a writ of certiorari should issue to

1

"The North Carolina Bar," Vol. 24, (1977) No. 4 p. 16.

the Supreme Court of North Carolina to review that Court's denial of Petitioner's contention that Rule 31 (g) of the N. C. Rules of Appellate Procedure is unconstitutional insofar as a criminal defendant's counsel can be denied the opportunity to file a reply brief, appear for oral argument and petition for a rehearing if counsel believes in good faith that his contentions have been overlooked or misapprehended by the Court.

It is well settled that the due process clauses of the Fifth and Fourteenth Amendments do not establish an absolute right to appeal. United States v. MacCollum, 426 U.S. 317, 48 L.Ed 2d 666, 96 S. Ct 2086 (1976). However, "once the appellate process is made available, a State must provide a defendant an adequate opportunity to present his claims fairly in the context of the State appellate process." Ross v. Moffitt, 417

U.S. 600, 41 2 Ed 2d 341, 94 S. Ct. 2437 (1974). Heretofore, the attention of this Court has focused primarily upon the rights of indigent criminal defendants. The case at bar presents the opportunity to this Court to set forth the minimum constitutional requirements embodied in the right of a criminal defendant, indigent or not, to have "an adequate opportunity to present his claim fairly." Petitioner submits that such guidance is necessary due to the nationwide increase in appellate caseloads and the variety of attempts to alleviate the problem.

As the specific facts in this case indicate, counsel for a criminal defendant in North Carolina may be denied recourse through either a reply brief, oral argument, or rehearing to respond to what he believes in good faith to be a misapprehension of his argument by either the State Attorney General or the Court.

As often expressed by this Court, there is a substantial interest in finality to the criminal process. Petitioner submits that if criminal defendants do not believe their cases were given adequate State appellate review, there will be an increase in the number of both state and federal post-conviction remedies sought. A writ of certiorari should issue in this case to determine what constitutes due process in the review of criminal convictions.

II.

CERTIORARI SHOULD ISSUE TO DETERMINE WHETHER A STATE MAY DIFFERENTIATE BETWEEN APPEALS OF CIVIL AND CRIMINAL CASES TO THE DETRIMENT OF CRIMINAL DEFENDANTS.

In Rinaldi v. Yeager, 384 U.S. 305, 16 L Ed 2d, 86 S Ct 1497 (1966) Justice Stewart stated, "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once

established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the Courts." Although Rinaldi dealt with indigent appellants, the above statement applies with equal force to the present case. Petitioner submits that Rule 31 of the North Carolina Rules of Appellate Procedure has drawn an impermissible distinction by allowing petitions for rehearing in civil cases and denying rehearing in criminal cases.

As a hypothetical example, a person in North Carolina could be charged criminally for assault and sued in civil court for the same occurrence. If the person were convicted of criminal assault and found liable for damages caused by civil assault, he would have a right to appeal both cases. However, if he believed in good faith that the North Carolina Court of Appeals misapprehended his

contentions concerning a point of law common to both appeals, he could seek rehearing in the civil case but not in the criminal case. The usual practice in appellate procedure is to give priority to criminal appeals. Petitioner submits that North Carolina has, in violation of the equal protection clause of the Fourteenth amendment, differentiated between civil and criminal appellants unreasonably and to the detriment of the criminal defendant.

A writ of certiorari should issue to determine the validity of a state appellate procedure which draws a distinction between the rights of appellants in civil cases and appellants in criminal cases.

CONCLUSION

Wherefore, the Petitioner respectfully
prays that a writ of certiorari be issued
to the North Carolina Supreme Court.

This the 3rd day of June, 1978.

SEAWELL, POLLOCK, FULLENWIDER,
ROBBINS & MAY, P. A.

Counsel for Petitioner

By: Bruce T. Cunningham, Jr.
Bruce T. Cunningham, Jr.

Post Office Box 277
Carthage, N. C. 28327
919-947-2311

CERTIFICATE OF SERVICE

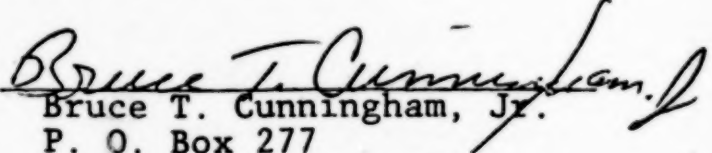
This is to certify that three (3) true and correct copies of the foregoing Petition for a Writ of Certiorari to the North Carolina Supreme Court of Appeals were served this date on the Attorney General of North Carolina, by depositing three (3) copies of same in the United States Mail, postage prepaid, addressed to:

Rufus L. Edmisten, Esquire
Attorney General
State of North Carolina
Raleigh, N. C. 27202

This the 3rd day of June, 1978.

SEAWELL, POLLOCK, FULLENWIDER,
ROBBINS & MAY, P. A.

Counsel for Petitioner

By: 
Bruce T. Cunningham, Jr.
P. O. Box 277
Carthage, N. C. 28327
919-947-2311

SUPREME COURT OF NORTH CAROLINA

Spring Term 1978

STATE OF NORTH CAROLINA

v

ANTHONY THOMAS

ORDER DENYING PETITION
FOR DISCRETIONARY REVIEW

(7720SC513)

78-2-0200

This cause came on to be considered upon the petition of the defendant for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G. S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference, this 7th day of March 1978 that the petition be denied and that it be so certified to the North Carolina Court of Appeals.

Issued under my hand and the seal of the Supreme Court this

8 day of March 1978.

John R. Morgan
John R. Morgan
Clerk of the Supreme Court
of North Carolina

cc: North Carolina Court of Appeals
Mr. Bruce T. Cunningham, Jr., Attorney at Law
Ms. Jo Anne Sanford Routh, Associate Attorney
Mr. Carroll Lowder, District Attorney
✓ Mr. C. M. McLeod, Clerk of Superior Court

A TRUE COPY
JOHN R. MORGAN
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA

Meredith B. Worley
DEPUTY CLERK
March 10 1978

No. 7720SC513

TWENTIETH DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA)

v)

) From Moore

ANTHONY THOMAS)

DEFENDANT APPELLANT'S BRIEF

(Filed Jul 20 3:33 PM '77)

STATEMENT OF QUESTIONS PRESENTED

1. Whether the trial Court erred in excluding evidence of the date of arrest simply because such evidence tended to prejudice the State's case.

2. Whether the trial Court erred in failing to set aside the verdict when the jury, through a question addressed to the Court, indicated it had disregarded the Court's instructions and placed the burden of proof on the Defendant.

STATEMENT OF THE CASE

The present case was called for trial at the February 28, 1977 Criminal Session of Moore County Superior Court before the Honorable Robert L. Gavin. The Defendant was charged in a bill of indictment with armed robbery, and upon a verdict of guilty was sentenced to not less than thirty nor more than thirty-five years in the custody of the Department of Corrections.

The Defendant assigns error and appeals to the North Carolina Court of Appeals.

STATEMENT OF FACTS

The State's witness J. Ayers Ricker testified that he was at his place of work on November 12, 1976 when a young man entered the motel and robbed him of Sixty (\$60.00) Dollars. That same evening Officer Arthur Frye of the Aberdeen Police Department showed Mr. Ricker approximately ten (10) photographs. Mr. Ricker picked out a picture of the Defendant that he said looked like the man who robbed him. (R pp 5-6) Officer Frye then located Mr. Thomas on the evening of November 12th, questioned him, and let him go. Also, Officer Frye questioned Mr. Thomas on Saturday afternoon, November 13, 1976. (R p 8). No order of arrest was issued for Mr. Thomas until November 20, 1976. (R p 2) The State did not call as a witness the investigating officer and when defense counsel attempted to elicit direct testimony concerning the length of time between questioning and arrest, the State objected to the evidence as being irrelevant and prejudicial. (R p 8) The trial Court's sustaining of the objection

and admonition to defense counsel not to go into such evidence constitutes the first assignment of error. (R p 15)

The Defendant testified in his own behalf and stated that he had been at the Aberdeen Grill on November 12, 1976. He stated that he left the grill at approximately 6:00 p.m. and began walking to his sister's house a mile away. Mr. Thomas testified that when he was halfway home he caught a ride with Jimmy Campbell for part of the way. (R p 8, p 10) Mr. Campbell did not testify although other individuals Mr. Thomas said he was with that night did testify on his behalf. Mr. Thomas denied being anywhere near the Pinehurst Motor Lodge on November 12, 1976 and the trial Court properly charged on alibi.

The jury retired for deliberation at 9:30 a.m. on March 1st and returned at 10:55 a.m. with a question. (R p 12) Through its foreman, the jury asked the following question: "We were wondering if it would be possible to hear from the person who was driving the car from whom Mr. Thomas got a ride after he left the Aberdeen Grill." (R p 12)

The trial Court instructed the jury that it would have to decide the case on the evidence presented and the jury returned to its room. Two minutes after the jury returned to its room, defense counsel requested the Court in chambers that an instruction be given on the burden of proof. (R pp 13,14) The Court declined to give such an instruction. Eight minutes later the jury returned with a verdict of guilty as charged. Thereupon, defense counsel moved to set aside the verdict on the grounds that the jury had disregarded the Court's original instructions on burden

of proof. (R p 14) The Court's denial of said motion constitutes the second assignment of error. (R p 15)

ARGUMENT

1. The trial court erred in excluding as irrelevant evidence showing the date of arrest when such evidence had probative value on the issue of identification.

Assignment of Error No. 1

Exception Nos. 1 and 2

The first assignment of error deals with the trial Court's refusal to let the Defendant present evidence concerning the date of arrest and when the Defendant talked to the investigating officer. The State argued that such evidence was irrelevant and prejudicial to the State's case. (R p 9) The Defendant contends that it is both relevant and admissible because it goes to the very heart of the only issue presented to the jury; the identity of the individual who robbed the Pinehurst Motor Lodge.

The law pertaining to relevancy and admissibility of evidence has been stated numerous times. "In criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." STATE v HAMILTON, 264 NC 286 (1965), STATE v HINTON, 14 NC App 564 (1972), STATE v ROBBINS, 287 NC 483 (1975).

The District Attorney, in his statement to the trial Court, makes the Defendant's argument. "It's obvious to the State what he is trying to do. He is trying to show that the officer who interviewed our witness

didn't arrest him the next day or some several days. Your Honor, please, the State of North Carolina should not be prejudiced in this cause because some officer didn't make an arrest on that particular day or the next and that's all he is trying to do is prejudice." It is true that the effort was to prejudice the State; that is, to provide the jury with information that would tend to question the degree of certainty of the identification by Mr. Ricker. As stated in STATE v GREEN, 251 NC 45 (1959), "But relevant evidence will not be excluded simply because it may tend to prejudice the opponent. . . ." GREEN, and most cases, deal with evidence which is prejudicial to the Defendant. But the rule works both ways. The reason that the State was trying so hard to exclude the evidence is the very reason that it is admissible.

The State chose not to call the investigating officer, Mr. Frye, as a witness. Therefore, any evidence relating to the date of arrest had to come from the Defendant. When the question was asked on direct examination, "When was the next time you saw Mr. Frye," it was objected to as being irrelevant. (R p 8) The objection was sustained and the answer of November 20th was placed in the record outside the hearing of the jury. The next question, also out of hearing of the jury, was concerned with the date of arrest. Again, the State objected as being irrelevant. (R p 9) After argument the trial Court ruled that it was not proper to ask when the Defendant was arrested. As a matter of record, the date of arrest was November 20, 1976. (R p 2) The Defendant respectfully submits that he should have been able to present such evi-

dence to the jury for their consideration on the question of the certainty of identification.

The investigating officer talked personally with Mr. Thomas twice after Mr. Thomas had been allegedly identified by Mr. Ricker in a photo line-up. The Defendant was not arrested until more than a week later. As indicated in defense counsel's statement to the Court, Defendant was attempting to establish his whereabouts and his contact with Officer Frye following the date of the robbery. It is respectfully submitted that the reasons justifying the admission of evidence of flight also justify admission of evidence of non-flight. That is, that acts of persons following the date of an alleged occurrence tend to "shed light" on the disputed issues of the case.

The question necessarily arises whether the Defendant was prejudiced by the exclusion of the offered testimony. The only issue presented to the jury was the identity of the perpetrator. The only evidence tending to place Mr. Thomas at the Pinehurst Motor Lodge was the testimony of Mr. Ricker. As discussed in the second assignment of error, the jury expressed the desire to hear more evidence than was presented at trial. After the Court instructed the jury that no more evidence could be heard, the Foreman stated that they would "try to make a decision on what (they had)" (R p 13) Given the reservation the jury apparently felt about the conclusiveness of the State's evidence, testimony as significant as the date of arrest and the whereabouts of the Defendant is relevant.

For all the above reasons and on the stated authorities, the Defendant respectfully submits that it was error to exclude testimony as to the date of arrest and that a new trial should be ordered by this Court.

2. The trial Court erred in failing to set aside the verdict when it became apparent that the jury had disregarded the Court's instructions on the burden of proof.

Assignment of Error No. 2

Exception No. 3

The second assignment of error concerns the refusal of the trial Court to set aside the jury's verdict after the jury had indicated that they desired the Defendant to produce additional alibi witnesses.

It is well established that "motions to set aside the verdict are addressed to the discretion of the trial Court and refusal to grant them is not reviewable in the absence of abuse of discretion." STATE v LINDLEY, 286 NC 259 (1974). What constitutes abuse of discretion defies definition and the particular facts of each case must be examined. Although a civil case, then Justice Sharp's statement in SELPH v. SELPH 267 NC 635 (1966) is the basic touchstone in considering this question. "The trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand." SELPH p 637.

The facts in the present case indicate that the jury had improperly placed the burden of proof on the Defendant and the Foreman's question called out for the intervention of

the Court.

As previously stated, the Defendant offered alibi witnesses as to his whereabouts on November 12, 1976. The Defendant further testified that he had received a ride for a short distance from Jimmy Campbell. (R p 10) After an hour and a half of deliberation the jury asked to hear from Jimmy Campbell and the Foreman stated that his testimony would have the "most bearing" on the case. "That seems to be the only one that is really missing and the one that would have the most bearing on the case." (R p 12) After the jury returned to its room, and within two minutes, counsel for Defendant requested that the Court instruct the jury a second time on the allocation of burden of proof. (R p 13) The trial Court had properly instructed the jury on this issue in its original charge, and the charge is therefore not included in the record. However, the jury's question clearly indicated that it was not fully satisfied of the Defendant's guilt and it desired Mr. Thomas to produce additional exculpatory evidence.

The testimony of Jimmy Campbell was no part of the State's case. The State had presented direct evidence by Mr. Ricker, who supposedly had identified Mr. Thomas. Apparently the jury was not satisfied with Mr. Ricker's testimony and wanted to hear the Defendant prove his whereabouts at the time of the robbery.

Defendant's counsel has been unable to discover any case where this precise question has been presented. Hopefully, the uniqueness of the argument will not detract

from its merit. An overall examination of the record indicates that the jury improperly placed the burden of proof on the Defendant, and, in Justice Sharp's words, to let the verdict stand, would work an injustice.

CONCLUSION

As to Assignment of Error No. 1, it is respectfully requested that the decision of the trial Court in excluding certain evidence be reversed and a new trial granted.

As to Assignment of Error No. 2 it is respectfully requested that this Court reverse the trial Court's refusal to set aside the verdict, and order a new trial.

Respectfully submitted this the 20th day of July, 1977.

SEAWELL, POLLOCK, FULLENWIDER,
ROBBINS & MAY, P.A.
By: s/ Bruce T. Cunningham, Jr.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief was this date served on the Attorney General by depositing a copy of same in the United States mail, postage prepaid, addressed to:

Honorable Rufus L. Edmisten
Attorney General
Justice Building
Raleigh, North Carolina 27602

This the 20th day of July, 1977.

SEAWELL, POLLOCK, FULLENWIDER,
ROBBINS & MAY, P.A.
By: s/ Bruce T. Cunningham

NO. 7720SC513

TWENTIETH DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA }

v

ANTHONY THOMAS }

From Moore

BRIEF FOR THE STATE
(Filed Aug 12 2:42 PM '77)

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN EX-
CLUDING TESTIMONY REGARDING THE DATE OF
DEFENDANT'S ARREST.

II. WHETHER THE TRIAL COURT ERRED IN FAIL-
ING TO SET ASIDE THE VERDICT SUBSEQUENT TO A
REQUEST BY THE JURY TO HEAR FROM AN ADDI-
TIONAL WITNESS.

STATEMENT OF THE CASE

Defendant's Statement of the Case is
accurate and the State has nothing further
to add.

STATEMENT OF THE FACTS

J. Ayers Ricker testified for the State
that around 6:00 or 6:30 p.m. on November
12, 1976, while working at the Pinehurst
Motor Lodge as a desk clerk, he was robbed
by a man wielding a gun. (R pp 5-6). He
noted that the gunman's face had not been
concealed, and that the gunman-defendant

was in his presence for approximately 5 to 6 minutes. He identified defendant as the robber from a photograph on the night of November 12, at a preliminary hearing in Southern Pines, and in open court, and testified that he was "positive as to the identification." (R p 6).

Defendant testified that after shooting pool on the afternoon of November 12, 1976 at the Aberdeen Grill, he left around 6:00 p.m. and walked for approximately half of the one mile distance to his sister's home then "caught a ride" with Jimmy Campbell (R pp 8, 10). Shortly afterwards, he left again for the Fox Club, walked part way with Ann and Robina Reeves, then arrived at the Club between 7:00 and 8:00 p.m. (R p 8). He stated that Police Officer Frye questioned him later that evening at the Country Kitchen then again on the afternoon of Saturday, November 13. (R p 8).

After the Court sustained the State's objection to questions re the length of time between initial questioning and arrest, the Judge permitted the defendant to indicate for the record that after November 13 he next saw Officer Frye on November 20 when he was arrested.

Defendant offered one witness who testified to defendant's presence at the Aberdeen Grill at around 6:00 p.m., November 12, 1976, and two others who testified to having walked with defendant to the Fox Club at around 7:00 or 7:30 p.m. that evening. (R pp 11-12).

The jury retired at 9:30 a.m. on March 1 and returned at 10:55 a.m. to inquire whether the person with whom defendant rode from the Aberdeen Grill to his sister's home could be presented for questioning. (R p 12). After consultation at the bench

between the District Attorney and defendant's counsel, agreement was reached that the only instruction to be given was that the jury would have to determine the case on the evidence presented. (R p 13). The jury again retired to the jury room, whereupon defendant's counsel entered the Judge's chambers to request additional instructions, to-wit: that the State has the burden of proof. The trial court denied the request, noting for the record that the same instructions had previously been given and that the only timely request for special instruction throughout the proceeding was that made by the defendant re reasonable doubt and granted by the Judge at the close of his regular instructions. (R p 14).

At 11:05 a.m. the jury returned a guilty verdict, whereupon defendant's counsel made a motion to set aside the verdict; the Court denied the motion and defendant appealed to this Court.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN EXCLUDING AS IRRELEVANT EVIDENCE SHOWING THE DATE OF DEFENDANT'S ARREST.

Assignment of Error No. 1 (R p 15)
Exception Nos. 1 and 2 (R pp 9, 10)

Defendant contends by this assignment of error that the trial court's refusal to allow the defendant to present evidence concerning the date of his arrest constituted prejudicial error inasmuch as such evidence had probative value on the issue of identification. He further supports this argument by maintaining that, just as evidence of flight is admissible in a criminal prosecution, so should the evidence of defendant's failure to flee have been admissible for the purpose of "shedding light" on the disputed issue in this

case.

The defendant correctly states the general rule applicable to the relevancy and admissibility of evidence in a criminal prosecution, to-wit: that every circumstance that is calculated to throw any light upon the supposed crime is admissible in evidence. STATE v HAWKINS, 214 NC 326, 199 SE 2d 284. However, it is also true that the matter offered must be relevant to the issues and must tend to establish or disprove them. STATE v SHAW, 284 NC 366, 200 SE 2d 585, and the State contends that testimony re whether defendant fled the area or remained in town for eight days after the crime tends to do neither.

The State's only witness was J. Ayers Ricker, desk clerk at the Pinehurst Motor Lodge, who testified unequivocally that he had recognized defendant as the robber from pictures shown to him on the very night of the incident, that he had had sufficient opportunity to observe the defendant, that he was positive as to the identification, and that in open court saw in the person of defendant the individual who robbed him. This was the only evidence offered by the State, and it is difficult to imagine how testimony relative to a lapse of eight days between crime and arrest would tend to disprove or cast doubt on the prosecution witness's testimony identifying defendant as the robber. Thus, the trial court correctly excluded the irrelevant testimony, for the fact of a delay in arrest by the police does not bear on the certainty of the identification of defendant by witness Ricker.

Defendant further submits that the reasons justifying admission of evidence of flight also justify evidence of non-flight, and the State will briefly address this contention. The general rule is that the defendant

in a criminal case is not, for the purpose of showing his innocence, allowed to prove that he refused to take to flight before his arrest or to escape from jail after his arrest, even though offered the opportunity to do so. 29 AM JUR 2d, EVIDENCE, Sec. 287, p 334. It is settled in North Carolina that a defendant's failure to take advantage of the opportunity to escape is not admissible in his behalf. STATE v TAYLOR, 61 NC 508 (1868); STATE v WILCOX, 132 NC 1120, 44 SE 625 (1903). The justifications for the rule are that such protestations are merely in the way of self-serving declarations, and that admitting such evidence would enable guilty parties to manufacture evidence in their favor. Thus, this argument re the relevancy of defendant's failure to flee should fail.

Even if the testimony was relevant as having any logical tendency, however, slight, to prove the fact in issue, then defendant is nevertheless required by well-settled rule to not only show error but also to show that the error complained of affected the result adversely to him. STATE v PAIGE, 272 NC 417, 158 SE 2d 522. More specifically, and more fatal to defendant's argument in this case, is the rule that to warrant a new trial there should be made to appear that the ruling complained of was material and prejudicial to defendant's rights and THAT A DIFFERENT RESULT WOULD HAVE LIKELY ENSUED. STATE v JONES, 278 NC 259, 179 SE 2d 433. Defendant's argument in no wise meets this burden. The issue below was as to defendant's identity as the perpetrator of the offense. The State's sole witness testified that defendant was the robber, while defendant's testimony and one of defendant's witnesses tended to place him in another location around the time of the crime. Aside from some corroborative testimony offered on defendant's behalf, this was the only

evidence presented to the jury, and the timing of defendant's arrest by Officer Frye could have had no bearing on the resolution of this issue of defendant's identity.

It is the task of the jury to determine the weight and credibility of the evidence, to resolve conflicts between witnesses, and to determine the facts, and the jury is at full liberty to acquit the defendant if it is not satisfied from all the evidence that defendant's guilt has been proven beyond a reasonable doubt. 4 STRONGS N. C. INDEX 3d CRIMINAL LAW, Sec. 103. The jury below evidently felt able to determine defendant's guilt as the robber based on the evidence presented, and as the proffered testimony was not relevant to the sole issue of identity, its exclusion cannot be deemed prejudicial.

In sum, the State initially contends that the trial court's exclusion of the referenced testimony was not error because the evidence was not relevant to the disputed issue. Secondly, the State notes that even if exclusion of the testimony was technically error, not every erroneous ruling on the admissibility of evidence will result in a new trial being ordered, and that defendant has failed to meet the burden of showing that the result below would likely have been changed thereby. Therefore the State urges that this argument presents no reversible error.

II. THE TRIAL COURT DID NOT ERR IN FAILING TO SET ASIDE THE VERDICT AFTER THE JURY'S REQUEST THAT AN ADDITIONAL WITNESS BE PRODUCED.

Assignment of Error No. 2 (R p 15)
Exception No. 3 (R p 14)

Defendant assigns error to the trial

court's refusal to set aside the jury's verdict, contending that the jury's request to hear from an additional witness constituted an indication that it improperly placed the burden of proof on the defendant.

Defendant concedes at page 8 of his brief that the trial court had properly instructed the jury on this issue in the original charge. Further, the Court noted for the record that the only timely request for special instructions had been tendered by defendant's counsel at the close of the original charge, and that the Court had tendered such instructions as requested on the issue of reasonable doubt. The Court also stated that after the jury's request to hear from Jimmy Campbell, both State and defense counsel and the judge conferred at the bench and agreed that the only instruction to be given was that the jury must decide the case on the evidence presented. "A statement by the court in regard to the argument of counsel and the admissions of the parties is conclusive, since it is for the court to say what occurred during the trial." 4 STRONG'S N. C. INDEX 3d, Criminal Law, Sec. 158. It was after the jury had retired for the second time that defendant's counsel requested the Court to again charge the jury on burden of proof, and it is for the Court's failure to do so that defendant maintains that a new trial should be ordered.

Defendant's brief correctly states the settled law on motions to set aside the verdict, i.e., that they are addressed to the discretion of the trial court and that refusal to grant them is not reviewable in the absence of abuse of discretion. STATE v LINDLEY, 286 NC 255, 210 SE 2d 207. Defendant does not allege any misconduct by the Court affecting the jury or any misconduct by the jury; but rather that the

jury indicated by their request to the Court a misapprehension of the law on allocation of burden of proof in a criminal case, and that the Court should therefore have set aside the verdict.

The State contends that it is speculative to draw from the jury's request for an additional witness the conclusion that the jury failed to understand the previously and correctly tendered charge on burden of proof, and that to set aside verdicts merely because a jury has difficulty in reaching them or would like to know additional facts about the incident is contrary to settled practice and would manifestly undermine the jury system to so obvious an extent that it warrants no further explanation.

As noted above, it is the exclusive province of the Court to determine the competency, admissibility, and sufficiency of the evidence, and to explain the law to the jury. 4 STRONG'S N. C. INDEX 3d, Criminal Law, Sec. 103. This responsibility was discharged by the trial court in its original charge. It is the task of the jury alone to determine the weight and credibility of the witnesses, and to determine the facts, (Ibid), and this task includes resolving contradictions between witnesses. The jury had been instructed that the defendant's guilt must be proven beyond a reasonable doubt, and as they thus knew that they were at liberty to acquit or convict, based on the evidence, the trial court was fairly required to assume that their conclusion was regularly reached and correctly refused to second-guess the panel.

In a similar case a request not in writing and first made after the court had concluded its charge, that the court define "reasonable doubt," was deemed addressed to the sound discretion of the court, and its

refusal to recall the jury and give the requested instruction was not error. STATE v BROOME, 260 NC 298, 150 SE 2d 416. In another case the trial judge's denial of the jury's request for additional evidence was also held not to be error. STATE v HATCH, 21 NC App 148, 203 SE 2d 334, cert. den. 285 NC 375, 200 SE 2d 100. Of course, defendant here contends that the jury's request made it manifest that it had misapprehended the law on burden of proof, but the State disputes this conference, and submits that the jury was merely seeking additional information from which to resolve the discrepancies between the State's and defendant's witnesses. The judge correctly and with the approval of both parties instructed that the jury must decide on the evidence presented.

In sum, the State submits that the trial court properly and adequately discharged its responsibilities and that no allegation of abuse of discretion herein can be supported.

CONCLUSION

For the reasons submitted above, the State respectfully requests that the trial below be found free from error and that the judgment of the trial court be affirmed.

Respectfully submitted this the 12 day
of August, 1977.

RUFUS L. EDMISTEN
Attorney General

s/ Jo Anne Sanford Routh
Associate Attorney
P. O. Box 629
Raleigh, N. C. 27602
(919) 733-5725

Office of the Clerk
North Carolina Court of Appeals
P.O. Box 2779
Raleigh, North Carolina 27602
Telephone: 919-733-3561

Date: October 11, 1977

To: Mr. Bruce T. Cunningham, Jr.
Attorney at Law
P. O. Box 277
Carthage, North Carolina

RE: St. v Thomas
No. 7720SC513

Dear Mr. Cunningham:

The Court of Appeals has entered an order under Rule 30(f) providing that the above-entitled case will be disposed of on the records and briefs. In accordance with said order, you are hereby notified not to appear for oral argument.

Very truly yours,

Frank Dail

Clerk
Court of Appeals

CC: Ms. JoAnne S. Routh

COA-70

State v. Thomas

For the reasons stated, we conclude that the defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. ANTHONY THOMAS

No. 7720SC513

(Filed 7 December 1977)

1. Criminal Law § 46— refusal of defendant to flee— evidence inadmissible

The trial court in an armed robbery prosecution did not err in refusing to allow defendant to show that he was not arrested for several days after he was questioned by an officer and that during that time he did not attempt to flee.

2. Criminal Law § 128— motion to set verdict aside— denied— no error

The trial court did not abuse its discretion in denying defendant's motion to set aside the verdict where the jury requested additional evidence; the court told them that they would have to decide the case on the evidence presented; after the jury returned to the jury room, defendant requested that the jury be given additional instructions concerning the burden of proof; the court declined; and no objection was made and no exception taken.

APPEAL by defendant from *Gavin, Judge*. Judgment entered 1 March 1977, Superior Court, MOORE County. Heard in the Court of Appeals 24 October 1977.

Defendant was indicted for and convicted of armed robbery. From judgment of imprisonment for not more than 30 nor less than 35 years, defendant appealed.

The State presented one witness, J. Ayres Ricker, who was employed at the Pinehurst Motor Lodge on the 12th of November, 1976, as a desk clerk. He testified that on that date, between six and six-thirty p.m., he was robbed at gun point by defendant, whom he identified and pointed out in the courtroom. The witness stated that there were six overhead lights in the area where he and defendant were standing; that defendant had on a dark colored woolen cap, a black leather jacket, and dark trousers. Defendant's face was not covered. The defendant and Mr. Ricker had

State v. Thomas

a conversation of about two minutes duration. Defendant asked for change for a dollar, then pulled a gun out and demanded the rest of the money in the cash drawer. Mr. Ricker handed the money to him. The witness later identified defendant's photograph from a series of photographs furnished by an officer. Defendant was in the presence of Mr. Ricker for five to six minutes, and Mr. Ricker was positive about the identification.

Defendant testified in his own behalf. He said that he left the Aberdeen Grill about six o'clock, having been shooting pool with three others, whom he named, since about one o'clock that afternoon. Headed toward his sister's house, he walked about half way and caught a ride with Jimmy Campbell. His sister's house is about a mile from the Aberdeen Grill. At his sister's house, he ate and took a bath. About seven o'clock he left to go to the Fox Club, a distance of about one-half mile. When he was almost there, he met Ann and Robina Reeves and the three of them walked together to the Club. He stayed there until it closed and went from there to the Country Kitchen, arriving home about two-thirty or three a.m. On 13 November Officer Frye picked him up and asked him some questions but did not arrest him. A few days before 12 November he had checked in the Pinehurst Motor Lodge and stayed for about two nights with some friends playing cards. The pool hall is about a mile and one-half from the Pinehurst Motor Lodge.

One Albert Singletary testified that he saw defendant at the Aberdeen Grill at six o'clock on Friday, 12 November, and Ann and Robina Reeves both testified that about seven or seven-thirty they walked with defendant to the Fox Club.

Other facts necessary for decision are set out below.

Attorney General Edmisten, by Associate Attorney Jo Anne Sanford Routh, for the State.

Seawell, Pollock, Fullenwider, Robbins and May, by Bruce T. Cunningham, Jr., for defendant appellant.

MORRIS, Judge.

[1] By this appeal, defendant brings forward two assignments of error. The first one is directed to the court's excluding evidence concerning the date of arrest. It is obvious from the record that

State v. Thomas

defendant wanted to be allowed to show that he was not arrested for several days after he was questioned by Officer Frye on 13 November and that he remained in Aberdeen.

"The general rule is that the defendant in a criminal case is not, for the purpose of showing his innocence, allowed to prove that he refused to take to flight before his arrest or to escape from jail after his arrest, even though offered the opportunity to do so, at least in the absence of any testimony that he had attempted to flee or escape." 29 Am. Jur. 2d, 334, Evidence § 287. Refusal to flee or escape; voluntary surrender.

In *State v. Wilcox*, 132 N.C. 1120, 44 S.E. 625 (1903), defendant, at his second trial, sought to introduce testimony that since his incarceration, he had had numerous opportunities to escape but refused to do so. Justice Connor, writing for a unanimous Court, said:

"The exact question has been decided by this Court in *S. v. Taylor*, 61 N.C., 508, *Battle, J.*, saying: 'The argument in favor of the exception is that as the flight of an alleged criminal is admissible as evidence against him, his refusal to flee in the first instance and his declining to escape after having been admitted to jail ought to be admitted as evidence in his favor. The argument is plausible, but it would be permitting prisoners to make evidence for themselves by their subsequent acts.'", p. 1136.

and upheld the trial court's exclusion of the evidence. For the same reason, we overrule defendant's assignment of error.

[2] By his remaining assignment of error defendant contends that the court committed prejudicial error in denying his motion to set aside the verdict. He properly concedes that this motion is addressed to the court's discretion but he urges that to let the verdict stand in this case would work an injustice. Defendant relies on *Selph v. Selph*, 267 N.C. 635, 148 S.E. 2d 574 (1966), for his position. We do not so interpret Chief Justice Sharp's words. She said:

"The trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand; and, if no question of law or legal inference is involved

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in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion." (Citations omitted.) *Selph v. Selph*, at 637.

It is obvious that the trial court did not have the opinion that to let the verdict stand would result in injustice. No question of law or legal inference is involved in the motion. We are, therefore, obliged to determine whether the record reveals "a clear abuse of discretion". There is none. After the jury had deliberated for an hour and twenty-five minutes, they returned to the courtroom and, through the foreman, asked if they could hear from the person driving the car with whom defendant got a ride to his sister's house. The court quite properly told them that they would have to decide the case on the evidence presented. This was, according to the facts dictated into the record by the court, after the court, defense counsel, and the district attorney had agreed that this would be the only instruction to be given the jury in response to their inquiry. The jury returned to the jury room. After the jury had returned to the jury room, defendant requested that additional instructions be given the jury; i.e., that the State had the burden of proof. The court declined. No objection was made and no exception taken. The defendant moved to set aside the verdict on the grounds that the jury disregarded the court's instructions as to the burden of proof. The charge of the court is not made a part of the record. We assume, therefore, that it contained no error and that the defendant was satisfied with the court's instructions with respect to the burden of proof. In any event, it appears clear that the record is totally void of any words or actions on the part of the trial court which would amount to abuse of discretion.

In the trial of this case we find

No error.

Judges VAUGHN and CLARK concur.

MOTION TO SUSPEND RULES AND PETITION FOR
REHEARING (TO COURT OF APPEALS)

The Defendant, through his counsel, Bruce T. Cunningham, Jr., moves the Court pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure to suspend its rules and respectfully shows to the Court as follows:

1) That the Defendant was indicted for and convicted of armed robbery at the February 28, 1977 Session of Moore County Superior Court.

2) From a judgment entered on March 1, 1977 by the Honorable Robert L. Gavin sentencing the Defendant to imprisonment for not less than thirty or more than 35 years, Defendant appealed to this Court.

3) That Defendant docketed the Record on Appeal in this Court on June 30, 1977, and submitted his brief on July 20, 1977. That oral argument was scheduled in the above-captioned case for the afternoon session of the October 24, 1977 Session of this Court.

4) That on October 11, 1977, the Clerk of North Carolina Court of Appeals notified the undersigned that the Court had entered an order under App. R. 30(f) providing that the case would be disposed of on the record and briefs, and that the Defendant's counsel was not to appear for oral argument.

5) That on December 7, 1977 this Court issued its opinion in the present case affirming the Defendant's conviction.

6) That the mandate of this Court was issued on December 27, 1977.

7) That App. R. 31 of the North Carolina Rules of Appellate provides that parties in civil cases may petition for rehearing when, in the opinion of petitioner and supported by affidavits of two qualified attorneys, the Court has overlooked or misapprehended particular points of fact or law. That App. R. 31(g) of the N. C. Rules of Appellate Procedure provides that the Court will not entertain petitions for rehearing in criminal cases.

8) That App. R. 28(h) provides that no reply briefs will be received or considered except as provided by App. R. 28(c).

9) That the Defendant respectfully submits that the brief for the State gave undue important to an ill-considered, single statement in Defendant-Appellant's brief concerning evidence of flight. That the Defendant's assignment of error No. 1 (R p 15) does not refer to exclusion of evidence of non-flight, but refers to exclusion of evidence as to the date of arrest. That the state did not object to the proffered testimony on the grounds that it was evidence of non-flight, but on the grounds that the date of arrest was irrelevant (R p 8).

10) That the Defendant argues in his brief that "he should have been able to present such evidence (date of arrest) to the jury for their consideration on the question of the certainty of identification." Defendant-Appellant's brief, pp 5-6.

11) That the brief for the State cited two cases in support of the proposition that evidence of non-flight is inadmissible, STATE v TAYLOR, 61 NC 508 (1868), and STATE v WILCOX, 132 NC 1120 (1903). The Defendant has been unable to find any other cases addressing the issue of the admissibility of evidence of non-flight, and submits that both TAYLOR and WILCOX state that the argument in favor of admissibility is plausible. In WILCOX, the Court stated, "The writer, speaking for himself, has been impressed with the argument, and, subject to well-defined limitations, as, for instance, that the defendant was without any agency on his part given an opportunity to escape and refused to accept, is inclined to the opinion that his conduct is competent to go to the jury to be given such weight as under the circumstances of the case it is entitled to.-----"

12) That the Defendant did not have an opportunity, due to App. R. 28(h) and App. R. 30(f), to respond to the state's contentions concerning the applicability of TAYLOR and WILCOX to the present case.

13) That the opinion of this Court pertaining to Assignment of Error No. 1 adopted the State's argument concerning evidence of non-flight, citing TAYLOR and WILCOX, supra.

14) That, in order not to lose rights pursuant to Rule 15 of the N. C. Rules of Appellate Procedure, the Defendant has filed simultaneously with this Petition a request, pursuant to App. R. 15, for discretionary review by the North Carolina Supreme Court of this Court's decision.

WHEREFORE, the Defendant respectfully requests:

1) That an order be entered by this Court pursuant to App. R. 2, and in the interest of justice, suspending App. R. 31(g) and permitting a rehearing of this case;

2) That the Defendant be permitted to file a supplemental brief on the questions of (1) the relevance and admissibility of the proffered testimony, and (2) in the alternative, whether the decisions of STATE v WILCOX, 132 NC 1120, 44 SE 625 (1903) and STATE v TAYLOR, 61 NC 508 (1868) should be overruled.

This the 9th day of January, 1978.

s/ Bruce T. Cunningham, Jr.
Attorney for Defendant
P. O. Box 277
Carthage, North Carolina 28327

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this pleading in the above entitled action upon all other parties in this cause by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office Department properly addressed to the attorney or attorneys for the Plaintiff, the State of North Carolina.

Appendix G

NO. 7720SC513
NORTH CAROLINA COURT OF APPEALS

State of North Carolina

v

Anthony Thomas

County: Moore
Number: 76CR7948

ORDER

The following Order was entered: "The motion filed in this cause on the 11th day of January, 1978, and designated Motion to Suspend Rules and Petition for Rehearing is dismissed by order of the Court in conference on this 30th day of January, 1978."

The above order is therefore certified to the Clerk of the Superior Court in Moore County, North Carolina.

Witness my hand and official seal this the 30th day of January 1978.

Leslie E. Dail
Clerk of the Court of Appeals

- 29 -

NO. 12 PC

TWENTIETH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1978

STATE OF NORTH CAROLINA)

v

ANTHONY THOMAS

From Moore

PETITION FOR DISCRETIONARY REVIEW

UNDER G.S. 7A-31

(Filed January 11, 1978)

The Defendant pursuant to App. R. 15, respectfully shows to the Court:

1) That the Defendant was indicted by the grand jury of Moore County for robbery with a dangerous weapon on January 25, 1977. That the undersigned was appointed to represent the Defendant for the trial and appeal of the present case.

2) That on February 28, 1977, the Defendant was tried in the Superior Court of Moore County before a jury, with the Honorable Robert L. Gavin, Judge Presiding.

3) That the State's case-in-chief consisted of one witness, Mr. J. Ayers Ricker, who testified that he picked out the Defendant's picture from a photographic line-up and told officer Frye that the Defendant held him up on November 12, 1976. Exhibit A, Record on 5-6.

4) That Aberdeen police officer Frye, who

conducted the photo line-up, picked up the Defendant on the evening of November 12, 1976, questioned him, and released him. That officer Frye talked with the Defendant again on November 13, 1976, but did not arrest him. Record p 7.

5) That on November 20, 1976, a warrant for the Defendant was issued and he was arrested. Record, p 2.

6) That the Defendant took the stand and attempted to testify as to the number of conversations he had had with Officer Frye and the date of arrest. That the State objected on the grounds that the Defendant was trying to prejudice the State's case and that the evidence was irrelevant. Record, p 8.

7) That the Trial Court sustained the State's objection as to the proffered testimony. Record p 8.

8) That following a verdict of guilty and a sentence of imprisonment of not less than 30 nor more than 35 years, the Defendant gave notice of appeal to the North Carolina Court of Appeals. Record p. 15.

9) That the Defendant alleged two assignments of error, the first being that the trial Court erred in excluding evidence concerning the Defendant's arrest. Record p 13.

10) That in his brief, the Defendant argued that his contacts with Officer Frye and the ultimate date of arrest were relevant in that they shed light on a crucial issue presented in the case, that is, the certainty of Mr. Ricker's identification of the perpetrator of the crime.

Exhibit B, Defendant's Brief pp 4-6.

11) That at one point in his brief the Defendant made a single and, as it turned out,

111-considered reference to evidence of flight and non-flight; "it is submitted that the reasons justifying the admission of evidence of flight also justify admission of evidence of non-flight." Defendant's brief, p 6.

12) That the State's brief discussed Defendant's argument and then cited several cases concerning evidence of non-flight, STATE v TAYLOR, 61 NC 508 (1868), and STATE v WILCOX, 132 NC 1120 (1903).

Exhibit C

13) That App. R 28 (h) prohibited the Defendant from filing a reply brief in response to the State's argument concerning evidence of non-flight.

14) That on October 11, 1977 the Clerk of the North Carolina Court of Appeals notified the Defendant's counsel that, pursuant to App. R. 30(f), he was not to appear for oral argument.

Exhibit D

15) That on December 7, 1977 the North Carolina Court of Appeals filed its opinion in the present case affirming the Defendant's conviction. However, in discussing the Defendant's first assignment of error, the opinion of the Court of Appeals adopted the State's argument concerning evidence of non-flight and cited TAYLOR and WILCOX, supra.

Exhibit E

16) That App. R. 31(g) denies the Defendant the opportunity to file a petition for rehearing since the present case involves a criminal charge. Nevertheless, the Defendant has filed with the North Carolina Court of Appeals a motion to suspend its rules and grant a rehearing on the issues of the relevance of the excluded testimony and whether STATE v TAYLOR and STATE v WILCOX should be overruled.

Exhibit F

17) That the Court of Appeals issued its mandate to the trial tribunal on December 27, 1977.

Exhibit G

18) That the record in the present case indicates that a criminal Defendant can be denied recourse under the present Rules of Appellate Procedure to respond to what he believes, in good faith, to be a misapprehension of his arguments by either the State or the Court of Appeals.

19) That insofar as a criminal defendant can be denied, the opportunity to appear for oral argument, file a reply brief, or petition for rehearing, the North Carolina Rules of Appellate Procedure are violative of Defendant's rights secured by the due process clause of the Fifth Amendment of the Constitution of the United States and the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

20) That discretionary review by this Court of the determination by the Court of Appeals is warranted under G.S. 7A-31 because:

a) The issue of whether TAYLOR and WILCOX, supra are to be overruled involves legal principles of major significance to the jurisprudence of the State; and

b) That, should TAYLOR and WILCOX not be overruled, the opinion of the Court of Appeals extends the holding of the above cases beyond the facts of those cases, and review is appropriate by this Court under G.S. 7A-31(3).

c) The issue raised as to the lack of recourse available to a criminal defendant to respond to what he believes in good

faith to be a misapprehension of his contentions by either the State or the Court of Appeals presents a question of law going to the heart of the fundamental fairness of the Appellate procedure.

21) That this Court has, pursuant to its supervisory powers over the appellate procedure of this State, the power to modify the present appellate rules in the interest of justice.

WHEREFORE, the Defendant prays, in the alternative:

a) That an order be entered by this Court suspending the operation of App. R. 31(g) and permitting the Defendant to petition the Court of Appeals for a rehearing pursuant to App. R. 31(a); or,

b) That this Court grant Defendant's petition for discretionary review by this Court pursuant to App. R. 15; or,

c) That the Court grant such other relief as the Court considers appropriate.

This the 10th day of January, 1978.

SEAWELL, POLLOCK, FULLENWIDER,
ROBBINS & MAY, P.A.

By: s/ Bruce T. Cunningham, Jr.
Attorney for Defendant
P. O. Box 277
Carthage, North Carolina 28327
919-947-2311

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this pleading in the above entitled action upon all other parties in this cause by depositing a copy hereof in a post-paid wrapper in a post office or official

Supreme Court, U. S.
FILED

SEP 27 1978

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1735

ANTHONY THOMAS,

Petitioner

v.

THE STATE OF NORTH CAROLINA,

Respondent.

**RESPONSE TO PETITION FOR A
WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA**

RUFUS L. EDMISTEN
Attorney General

W. A. RANEY, JR.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1735

ANTHONY THOMAS,

Petitioner

v.

THE STATE OF NORTH CAROLINA,

Respondent.

**RESPONSE TO PETITION FOR A
WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA**

STATEMENT OF THE CASE

QUESTIONS PRESENTED

Petitioner's Statement of the Case and phrasing of the Questions is accurate and the State has nothing further to add.

STATUTES AND RULES INVOLVED

In addition to those cited by Petitioner the following statutes and rules are pertinent to this Response:

North Carolina Rules of Appellate Procedure

Rule 28(g) **Additional Authorities.**

Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties prior to the oral argument. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

Rule 31(f) **Waiver by Appeal from Court of Appeals.**

The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

REASONS FOR DENYING THE WRIT

- I. DENIAL BY THE STATE OF NORTH CAROLINA TO A CRIMINAL DEFENDANT OF THE OPPORTUNITY TO APPEAR FOR ORAL ARGUMENT AND TO PETITION FOR REHEARING DOES NOT ABRIDGE SAID DEFENDANT'S RIGHTS TO DUE PROCESS, GIVEN THE MULTIPLE AVENUES OF RELIEF AVAILABLE TO A CRIMINAL APPELLANT.

Petitioner correctly notes that the due process clauses of the Fifth and Fourteenth Amendments do not establish an absolute right of appeal. *U.S. v. MacCollum*, 426 U.S. 317, 48 L. Ed 2d 666, 96 S. Ct. 2086 (1976). The constitutional standard whereby a state's appellate process is measured is set forth in *Ross v. Moffitt*, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974): "...once the appellate process is made available, a State must provide a defendant an *adequate opportunity to present his claims fairly* in the context of the State appellate process." (Emphasis added). Respondent earnestly submits that the procedures embodied in the North Carolina General Statutes and Rules of Appellate Procedure provide this Petitioner and all other criminal defendants ample opportunity for a fair hearing.

The provisions of Rules 30(f), 31(a) and 28(h), North Carolina Rules of Appellate Procedure (hereinafter the Rules), all represent efforts to deal with the crowded criminal appellate dockets in North Carolina. This State grants an absolute right of appeal to any person who has entered a plea of not guilty to a criminal charge and has subsequently been found guilty (N.C.G.S. 15A-1444(a)). Additionally, a convicted person who has entered a plea of guilty or no contest may petition the appellate division for review by writ of certiorari (N.C.G.S. 15A-1444). The resultant crush of appellate cases required adoption of measures such as the challenged rules to alleviate the load and provide for some efficient use of judicial resources. The Rules are based on sound reasoning and insure ample

opportunity for a full and fair hearing to any appellant. An analysis of the effect of each rule in question buttresses the State's contention that no denial of due process results from the appellate scheme.

Rule 30(f) of the North Carolina Rules grants to the North Carolina Court of Appeals the prerogative of determining that oral argument will not be of assistance to the court and thereby disposing of the case on the record and briefs and dispensing with unnecessary oral arguments. Inasmuch as parties may not discuss in oral argument any authorities not cited either in the briefs or in a memorandum of additional authorities filed prior to argument [Rule 28(g), *infra*], the effect of denying an appellant the opportunity to present oral argument is abated substantially. Thus, Petitioner here could not at any rate have discussed authorities and arguments outside the brief had he been permitted to argue.

Rule 31(g) excepts criminal actions from its provisions for rehearing in the appellate courts, and thus limits that recourse to civil actions in instances where the court has "overlooked or misapprehended" the Petitioner's argument. Petitioner should not be heard to complain that this rule operated to deny him due process for a variety of reasons. The option of petitioning for rehearing is, even in the civil matters to which it is available, exclusive of the options of petitioning for discretionary review or of appealing to the North Carolina Supreme Court. A civil appellant/petitioner must opt for either a rehearing in the Court of Appeals or for discretionary review or appeal to the Supreme Court as per Rule 31(f), and a request for

either of the latter, more thorough types of review constitutes an abandonment of the petition for rehearing. Petitioner here had the option and in fact did petition for discretionary review pursuant to G.S. 7A-31 and Rule 15; thus, even had he been party to a civil matter, he would have abandoned his opportunity to petition for a rehearing. Had the North Carolina Supreme Court determined, based on the same arguments Petitioner presents herein, that the subject matter of his petition had significant public interest, or that the cause involved legal principles of major significance to the jurisprudence of the State, or that the decision of the Court of Appeals appeared to be in conflict with a decision of the higher court, then the Petition for Discretionary Review would have been granted. Petitioner also had available the option of appealing to the North Carolina Supreme Court from the decision of the Court of Appeals pursuant to G.S. 7A-30 and Rule 14 based on his evident belief that the matter involved a substantial question arising under the Constitution of the United States or of this State. It is likely that this avenue of review was the more appropriate one for Petitioner given his constitutional claims: that it was available illustrates the ample nature of appellate review provided by North Carolina, and that he did not avail himself of it represents yet another valid reason why he should not be heard to press his constitutional claim here. Also included in the panoply of post conviction remedies made available to a criminal defendant are motions for appropriate relief under G.S. 15A-1411 *et seq.* (a kind of post conviction proceeding) and writs of habeas corpus.

Finally, it is submitted that Rule 28(g), captioned "Additional Authorities", would have allowed Petitioner to have remedied his failure to discover the *Taylor* and *Wilcox* cases by filing a memorandum of additional authorities with the Clerk of the Court of Appeals prior to decision by that Court.

It is clear that North Carolina provides an array of appellate recourses to a criminal appellant which are designed to insure a variety of opportunities for presentation of his claims, and the State respectfully submits that certiorari need not issue to review this appellate scheme.

II. RULE 31 OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE MAKES A VALID DISTINCTION BETWEEN CIVIL AND CRIMINAL CASES RELATIVE TO PETITIONS FOR REHEARING AFTER AN APPEAL.

Inasmuch as the bulk of the North Carolina appellate courts' caseload consists of criminal appeals and petitions, to allow petitions for rehearing in such cases would likely result in a flood of such petitions which would clog already crowded dockets. The civil/criminal distinction is justified in that a criminal appellant has infinitely greater recourse than does a civil appellant. (See Argument I, *supra*) Petitioner's contention that Rule 31 draws an impermissible distinction by allowing petitions for rehearing in civil cases but denying them in criminal cases is not supported; the State submits that not only is the distinction a sound and necessary one but also that

ample alternative avenues of review are available to the defendant after determination of his case by the Court of Appeals (i.e., the aforementioned petition for discretionary review, appeal, motion for appropriate relief, writ of habeas corpus). Petition cites *Rinaldi v. Yeager*, 384 U.S. 305, 16 L. Ed. 2d 153, 86 S. Ct. 1497 (1966) for the proposition that avenues of appeal must be kept free of "unreasoned distinctions"; the State contends that the distinction between civil and criminal cases drawn by Rule 31 is amply reasoned and necessary and respectfully submits that no examination of the procedure by this Court is warranted.

III. THE DECISION OF THE COURT BELOW WAS CORRECT IN ALL RESPECTS CONCERNING EXCLUSION OF THE EVIDENCE IN QUESTION.

In the instant case Petitioner's reliance on the import of the excluded evidence is undue and his declaration of the "sole" basis for the exclusion inaccurate. Defendant's brief below cited two reasons for admission of the testimony concerning the date of his arrest: its alleged probative value on the issue of identification and its tendency to "shed light" on the issue by showing that he did not flee after the crime. The State's brief in Argument I rebutted *both* of Defendant-Petitioner's purported rationales for admission of the evidence; thus, there was no misapprehension by the State of his two-prong justification for admission of the disputed evidence. The argument that the evidence was relevant in that it shed light on the certainty of the identification of Defendant by the State's witness is not tenable, inasmuch as the sole State's witness testified

unequivocally regarding his identification of Thomas as his assailant. The State submits that neither error nor prejudice was shown by the exclusion of this evidence, as any delay on the part of the arresting officer could have no effect on the certainty of the prosecuting witness's identification of Defendant, and this was the only testimony presented as to identification. Regarding the excluded testimony as evidence of "non-flight", North Carolina is in accord with the majority American rule in holding that a defendant's failure to take advantage of an opportunity to escape is not admissible in his behalf. See 29 *Am. Jur.* 2d, Evidence, Sec. 287, p. 334. *State v. Taylor*, 61 N.C. 508 (1868); *State v. Wilcox*, 132 N.C. 1120, 44 S.E. 625 (1903). Hence, no error of law can be shown which justifies review by this Court of the proceedings below.

CONCLUSION

WHEREFORE, as Petitioner has cited no federal cases contrary to the applicable rules of law below and has shown no procedural deprivation of due process or infringement of his rights to equal protection, it is respectfully prayed that the Petition for Writ of Certiorari be denied.

This the 27th day of September, 1978

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CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing response to Petition for a Writ of Certiorari to the North Carolina Supreme Court were served this day on Bruce T. Cunningham, Jr., Counsel for Petitioner, by depositing three (3) copies of the same in the United States Mail, postage prepaid, addressed to:

Bruce T. Cunningham, Jr.
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This the 27th day of September, 1978.

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